



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1150

[Document No. AMS-DA-14-0074]

National Dairy Promotion and Research Program Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document invites comments on a proposed amendment to the Dairy Promotion and Research Order (Dairy Order). The proposal would modify the number of National Dairy Promotion and Research Board (Dairy Board) importer members. The total number of domestic Dairy Board members would remain the same at 36 and the total number of importer members would be reduced from 2 to 1. The Dairy Order requires that at least once every three years, after the initial appointment of importer members on the Dairy Board, the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years and, on the basis of that review, if warranted, reapportion the importer representation on the Dairy Board to reflect the proportional shares of the United States market served by domestic production and imported dairy products. This reapportionment review is the first conducted since importer members were appointed to the Dairy Board on November 2, 2011. The review could not be conducted prior to 2015 since the required data was not available.

DATES: Comments must be submitted on or before [insert date 30 days after the date of publication in the **Federal Register**].

ADDRESSES: Comments on this proposed rule should be identified with the docket number AMS-DA-14-0074. Commenters should identify the date and page number of the issue of the proposed rule. Interested persons may comment on this proposed rule using either of the following procedures:

- Mail: Comments may be submitted by mail to Whitney A. Rick, Director, Promotion, Research and Planning Division, Dairy Program, AMS, USDA, 1400 Independence Ave., SW, Room 2958-S, Stop 0233, Washington, DC 20250-0233.
- Fax: Comments may be faxed to (202) 720-0285.
- Email: Comments may be emailed to Whitney.Rick@ams.usda.gov.
- Internet: www.regulations.gov.

All comments to this proposed rule, submitted by the above procedures will be available for viewing at: www.regulations.gov, or at USDA, AMS, Dairy Program, Promotion, Research and Planning Division, Room 2958-S, 1400 Independence Ave., SW, Washington, DC, from 9 a.m. to 4 p.m., Monday through Friday, (except on official Federal holidays). Persons wanting to view comments in Room 2958-S are requested to make an appointment in advance by calling (202) 720-6909.

FOR FURTHER INFORMATION CONTACT: Whitney A. Rick, Director, Promotion, Research, and Planning Division, Dairy Program, AMS, USDA, 1400 Independence Ave., SW, Room 2958-S, Stop 0233, Washington, DC 20250-0233. Phone: (202) 720-6909. Email: Whitney.Rick@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This proposed rule is issued pursuant to the Dairy Production Stabilization Act (Dairy Act) of 1983, Pub L. 98-180 as codified in 7 U.S.C. 4501-4514, as amended.

Executive Order 12866

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have a retroactive effect. If adopted, this rule would not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

The Dairy Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 118 of the Dairy Act, any person subject to the Dairy Order may file with the Secretary a petition stating that the Dairy Order, any provision of the Dairy Order, or any obligation imposed in connection with the Dairy Order is not in accordance with the law and request a modification of the Dairy Order or to be exempted from the Dairy Order (7 U.S.C. § 4509). Such person is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Dairy Act provides that the district court of the United States in any district in which the person is an inhabitant or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has

certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. The purpose of the Regulatory Flexibility Act is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened.

The Dairy Act authorizes a national program for dairy product promotion, research and nutrition education. Congress found that it is in the public interest to authorize the establishment of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

According to the U.S. Customs and Border Protection (CBP), in 2014, approximately 1,400 importers paid assessments under Section 1150.152(b). Although data is not available concerning the sizes of these firms, it is reasonable to assume that most of them would be considered small businesses. Although many types of businesses import dairy products, the most common classification for dairy product importers is Grocery and Related Product Merchant Wholesalers (North American Industry Classification System, category 4244). The Small Business Administration [13 CFR 121.201] defines such entities with fewer than 500 employees as small businesses.

The proposed rule would amend the Dairy Order by modifying the number of Dairy Board importer members.

Currently, the Dairy Order is administered by a 38-member Dairy Board, 36 members representing 12 geographic regions within the United States and 2 members representing importers. The Dairy Order at section 1150.131(f) provides that at least once every three years,

after the initial appointment of importer members on the Dairy Board, the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years and, on the basis of that review, if warranted, reapportion the importer representation on the Board to reflect the proportional shares of the United States market served by domestic production and imported dairy products.

The proposed amendment should not have a significant economic impact on persons subject to the Dairy Order. The proposed changes merely would allow representation on the Dairy Board to better reflect the volume of dairy product imports into the United States.

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. chapter 35], the information collection requirements and record keeping provisions imposed by the Dairy Order have been previously approved by OMB and assigned OMB Control No. 0581-0093. No relevant Federal rules have been identified that duplicate, overlap, or conflict with this rule.

Statement of Consideration

The Dairy Order is administered by a 38-member Dairy Board, 36 members representing 12 geographic regions within the United States and 2 members representing importers. The Dairy Order requires in Section 1150.131(f) that at least once every three years, after the initial appointment of importer representatives on the Dairy Board, the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years and, on the basis of that review, if warranted, reapportion the importer representation on the Dairy Board to reflect

the proportional shares of the United States market served by domestic production and imported dairy products. This reapportionment review is the first conducted since importer members were appointed to the Dairy Board in 2011.

For initial representation of importers, the Dairy Act states “In making initial appointments to the Board of importer representatives, the Secretary shall appoint 2 members who represent importers of dairy products and are subject to assessment under the order.” (7 U.S.C. § 4504(b)(6)(A)) For subsequent representation of importers, the Dairy Act goes on to state “At least once every 3 years after the initial appointment of importer representatives under subparagraph (A), the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous 3 years and, on the basis of that review, shall reapportion importer representation on the Board to reflect the proportional share of the United States market by domestic production and imported dairy products.” (7 U.S.C. § 4504(b)(6)(B))

The Dairy Order at section 1150.131(f) states that the basis for the comparison of domestic production of dairy products to imported products should be estimated total milk solids. The calculation of total milk solids of imported dairy products for reapportionment purposes “shall be the same as the calculation of total milk solids of imported dairy products for assessment purposes.” The reapportionment review was not conducted prior to 2015 because three full years’ worth of data was not available.

Using National Agricultural Statistics Service (NASS) annual Dairy Products Summary data, the average U.S. milk total solids for domestic dairy products for 2012 to 2014 was 23,462 billion pounds annually. Based on the total milk solids number, each of the 36 domestic Dairy

Board producer members would represent 652 million pounds of total milk solids (23,462 billion pounds divided by 36 producer members equals 652 million pounds per producer).

Using information received from CBP, the average total milk solids imported during 2012 to 2014 was 589 million pounds. Currently, each of the two importers on the Dairy Board would represent approximately 295 million pounds of total milk solids (589 million pounds divided by 2 importer members equals 295 million pounds per importer). Table 1 summarizes the total milk solids represented by the 36 domestic producer members and the total milk solids represented by the 2 current importer members.

Table 1 – Current Dairy Board Representation Based on U.S. Total Solids and Imported Total Solids by Pounds

Year	U.S. Total Solids, lbs.	Imported Total Solids, lbs.
2012	23,376,000,000	598,554,055
2013	23,203,000,000	570,628,490
2014	23,805,666,667	598,707,413
Average	23,461,555,556	589,296,653

Source: NASS, Dairy Products Annual Survey and CBP

Table 2 – Current Dairy Board Representation Based on Average U.S. Total Solids and Average Imported Total Solids

	Average Total Milk	Current Number of	Average Total Milk
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	Solids (lbs.)	Board Seats	Solids Represented Per Board Member (lbs.)
Domestic Producer	23,461,555,556	36	651,709,877
Importer	589,296,653	2	294,648,327

Based on the calculations, it is proposed that Dairy Board importer member representation be reduced from 2 importer members to 1 importer member, to accurately represent the volume of imported total milk solids compared to the volume of total solids represented by each of the 36 domestic producer members. Table 2 reflects the proposed changes.

Table 3 – Proposed Dairy Board Representation Based on U.S. Total Solids and Imported Total Solids

	Average Total Milk Solids (lbs.)	Current Number of Board Seats	Average Total Milk Solids Represented Per Board Member (lbs.)
Domestic Producer	23,461,555,556	36	651,709,877
Importer	589,296,653	1	589,296,653

A 30-day comment period is provided for interested persons to comment on this proposed rule. One term of office for an importer member will expire on October 31, 2016. Thus, a 30-day comment period is provided for a timely announcement of the Dairy Board nomination solicitation in 2016.

List of Subjects in 7 CFR Part 1150

Dairy Products, Milk, Promotion, Research.

For the reasons set forth in the preamble, it is proposed that 7 CFR part 1150 be amended as follows:

PART 1150 - DAIRY PROMOTION PROGRAM

1. The authority citation for 7 CFR part 1150 continues to read as follows:

Authority: 7 U.S.C. 4501-4514 and 7 U.S.C. 7401.

2. In § 1150.131, paragraph (c) is revised to read as follows:

§ 1150.131 Establishment and membership.

* * * * *

(c) One member of the board shall be an importer who is subject to assessments under § 1150.152(b).

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Dated: March 29, 2016

Erin Morris
Associate Administrator
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